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A

Public Prosecutor v Jitweer Singh a/l Ojagar Singh

B

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–286 OF 2011(B)
HASHIM YUSOFF, AHMAD MAAROP, HASAN LAH, ZAINUN ALI AND JEFFREY TAN FCJJ
5 AUGUST 2013

C

Criminal Procedure — Appeal — Appeal against acquittal — Appeal by prosecution — Accused person acquitted of charge for murder — Prosecution relied on circumstantial evidence — Whether there was link of accused person to murder — Failure to call material witness — Whether warranted invocation of adverse inference under s 114(g) of the Evidence Act 1950 — Whether admissible — Whether there were efforts taken by prosecution to secure attendance of witness — Whether deceased died from natural cause — Whether circumstantial evidence gave rise to inference that accused caused death of deceased — Criminal Procedure Code s 112

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The respondent ('the accused'), a medical doctor, was charged for the murder of his estranged wife on 22 October 2007 but was acquitted by the trial court and this decision was affirmed by the Court of Appeal. The prosecution's case was based on circumstantial evidence. The trial court held that there was a material gap in the prosecution's case as the prosecution had not called two material witnesses, namely, the driver and the maid to exclude the possibility of their involvement in the death of the deceased. Adverse inference under s 114(g) of the Evidence Act 1950 was invoked against the prosecution for its failure to procure the attendance of those two material witnesses. The Court of Appeal held that the circumstantial evidence was insufficient for an inference that it was the accused who had killed the deceased by the act of smothering or placing pressure on the neck of the deceased by a broad or soft ligature. Arguments on the wrongful rejection of the s 112 statement and the wrongful invocation of the adverse inference against the prosecution were not addressed by the Court of Appeal. The defence argued that the rejection of the s 112 statement was not in the grounds of appeal before this court and in fact, the rejection of the s 112 statement was also not in the grounds of appeal before the Court of Appeal. The other issue that arose were the admissibility of the voice message heard by SP3 where she heard the deceased saying to another person that she had broken her arm and that she wanted to make a police report. The trial court ruled that the voice message was inadmissible. Hence, the present appeal.

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Held, allowing the appeal and setting aside the acquittal:

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(1) The voice message was a fact which could be heard and it was the direct evidence of SP3 who said that she heard it. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question on hearsay only arose when the words spoken were relied on 'testimonially'. The prosecution had put it on record that the evidence of the voice message was not relied on testimonially to establish the facts narrated by the words. The object was to prove the fact of the voice message. Evidence of the fact of the voice message should not have been rejected (see para 8).

(2) According to the s 112 statement of the driver, the accused was the last person with the deceased when she was alive. The s 112 statement was wrongly rejected by the trial court. The invocation of the adverse inference was not warranted, for there was a comprehensive account of the efforts taken by the prosecution to secure the attendance of the driver, who with the maid had been deported to their country of origin in 2008, after they had served their term of imprisonment for an offence under the Immigration Act 1959/63. The prosecution could not do more than enlist the assistance of the Indonesian police to secure the driver and/or the maid (see paras 9 & 20).

(3) The deceased did not die from natural causes but had multiple injuries and died from asphyxia. There was no suggestion that the injuries were self-inflicted. The trial court should have accepted the conclusion of the pathologist and not rejected it. This court was satisfied beyond all reasonable doubt that the cause of death was not accidental and not suicidal but homicidal. Thus, the death of the deceased was a homicide with the requisite intent to kill. Given the multiple injuries and the symptoms of asphyxia in particular, it should have been evident to the accused who was a medical doctor that the deceased could not have died from natural causes. Yet, when asked for the reasons for the death of the deceased, the accused responded as if the deceased had died from some innocent cause (see paras 24–25).

(4) On the night before her death, the deceased related that her hand was broken and she wanted to lodge a police report. The post mortem revealed that the deceased had a broken elbow, which substantiated the truth of the facts asserted in the telephone conversation heard by SP3 (see para 27).

(5) There were no traces of common drugs or pesticides in the kidney specimen of the deceased, and no traces of alcohol or diazepam in the blood specimen of the deceased. The deceased could not have died from an overdose of drugs. Further, the deceased could not have died from bronchitis as the cause of death was homicidal. The accused proffered three different non-homicidal causes for the death of the deceased. If the accused was unaware that it was a homicide, then it should follow that he

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would not have delayed in giving his consent for a post mortem. Indeed, given the history of the bad marriage, it should have dawned upon the accused that if he had nothing to do with the death of the deceased, that the conduct of a post mortem, the earlier the better, would only serve his interests, to clear him of whatever suspicion of any foul play. However, the accused gave false reasons to account for the death of the deceased and delayed in giving his consent for a post mortem (see para 33).

[Bahasa Malaysia summary

Responden ('tertuduh'), seorang doktor perubatan, telah dituduh kerana membunuh bekas isterinya pada 22 Oktober 2007 tetapi telah dibebaskan oleh mahkamah perbicaraan dan keputusan ini telah disahkan oleh Mahkamah Rayuan. Kes pendakwaan adalah berdasarkan keterangan mengikut keadaan. Mahkamah perbicaraan memutuskan bahawa terdapat lompang yang nyata dalam kes pendakwaan kerana pendakwaan tidak memanggil dua saksi utama, iaitu, pemandu dan pembantu rumah untuk mengecualikan kemungkinan penglibatan mereka dalam kematian si mati. Inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 digunakan terhadap pendakwaan kerana kegagalannya untuk mendapat kehadiran dua saksi utama itu. Mahkamah Rayuan memutuskan bahawa keterangan mengikut keadaan tidak mencukupi untuk suatu inferens bahawa ia adalah tertuduh yang telah membunuh si mati dengan bertindak mencekik atau meletakkan tekanan pada leher si mati dengan ligatur yang luas atau lembut. Penghujahan tentang penolakan salah penyataan s 112 dan penggunaan salah inferens bertentangan terhadap pendakwaan tidak ditangani oleh Mahkamah Rayuan. Pembelaan berhujah bahawa penolakan penyataan s 112 bukan alasan rayuan di hadapan mahkamah dan bahkan, penolakan penyataan s 112 juga bukan alasan rayuan di hadapan Mahkamah Rayuan. Isu lain yang timbul adalah kebolehterimaan pesanan suara yang didengar oleh SP3 di mana dia telah mendengar si mati mengatakan kepada orang lain yang tangannya patah dan yang dia ingin membuat laporan polis. Mahkamah perbicaraan memutuskan bahawa pesanan suara itu tidak boleh diterima. Justeru, rayuan ini.

Diputuskan, membenarkan rayuan dan mengetepikan pembebasan:

(1) Pesanan suara itu adalah fakta yang boleh didengar dan ia adalah keterangan langsung SP3 yang mengatakan dia telah mendengarnya. Jika percakapan perkataan-perkataan itu adalah fakta yang relevan, seorang saksi boleh memberikan keterangan yang ia telah diucapkan. Persoalan berkaitan dengar cakap hanya timbul apabila perkataan-perkataan yang diucapkan itu digunakan secara 'testimonially'. Pendakwaan telah meletakkan atas rekod bahawa keterangan pesanan suara itu tidak boleh digunakan secara testimoni untuk membuktikan fakta-fakta yang disampaikan dengan perkataan. Tujuannya adalah untuk membuktikan fakta tentang pesanan suara itu. Keterangan tentang fakta pesanan suara

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itu tidak patut ditolak (lihat perenggan 8).

(2) Menurut penyataan s 112 pemandu itu, tertuduh adalah orang terakhir bersama si mati semasa dia hidup. Penyataan s 112 telah ditolak dengan salah oleh mahkamah perbicaraan. Penggunaan inferens bertentangan tidak wajar kerana terdapat pelbagai usaha yang dilakukan oleh pendakwaan untuk mendapatkan kehadiran pemandu, yang mana dengan pembantu tumah telah dihantar pulang ke negara asal mereka pada tahun 2008, selepas mereka menjalani tempoh pemenjaraan mereka kerana kesalahan di bawah Akta Imigresen 1959/63. Pendakwaan tidak boleh berbuat apa-apa lagi selain meminta bantuan polis Indonesia untuk mendapatkan pemandu dan atau pembantu rumah tersebut (lihat perenggan 9 & 20).

(3) Si mati tidak meninggal dunia akibat sebab semulajadi tetapi mengalami pelbagai kecederaan dan meninggal dunia kerana keadaan sesak nafas. Tiada cadangan yang kecederaan itu dilakukan sendiri. Mahkamah perbicaraan patut menerima kesimpulan ahli patologi dan tidak menolaknya. Mahkamah ini berpuas hati melampaui semua keraguan munasabah bahawa sebab kematian bukan suatu kemalangan dan bukan kerana membunuh diri tetapi pembunuhan. Oleh itu, kematian si mati adalah pembunuhan dengan keperluan niat untuk membunuh. Berdasarkan terdapat pelbagai kecederaan dan tanda-tanda keadaan sesak nafas khususnya, adalah jelas kepada tertuduh yang merupakan doktor perubatan mengetahui bahawa si mati tidak mungkin mati daripada sebab semula jadi. Malah, apabila ditanya sebab-sebab kematian si mati, tertuduh menjawab seperti si mati telah mati daripada sebab yang tidak boleh dipersalahkan (lihat perenggan 24 & 25).

(4) Pada malam sebelum kematiannya, si mati memberitahu yang tangannya patah dan dia ingin membuat laporan polis. Bedah siasat menunjukkan bahawa si mati mengalami siku yang patah, telah mengukuhkan kebenaran fakta yang dinyatakan dalam perbualan telefon yang didengar oleh SP3 (lihat perenggan 27).

(5) Tiada kesan dadah atau racun perosak biasa dalam spesimen buah pinggang si mati, dan tiada kesan alkohol atau diazepam dalam specimen darah si mati. Si mati tidak mungkin mati akibat mengambil dadah secara berlebihan. Tambahan, si mati tidak mungkin mati kerana bronkitis memandangkan sebab kematian adalah pembunuhan. Tertuduh memberikan tiga sebab bukan pembunuhan kerana kematian si mati. Jika tertuduh tidak sedar bahawa ia adalah pembunuhan maka adalah diikuti bahawa dia tidak mungkin lambat untuk memberi persetujuannya untuk bedah siasat. Sememangnya, berdasarkan sejarah perkahwinan yang bergolak, tertuduh patut menyedari bahawa jika dia tiada kaitan dengan kematian si mati, bahawa bedah siasat yang dilakukan, lebih awal lebih baik, hanya untuk kepentingannya, untuk

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membersihkannya daripada apa-apa syak wasangka tentang apa-apa unsur jenayah. Walau bagaimanapun, tertuduh telah memberi sebab palsu tentang kematian si mati dan melengahkan dalam pemberian persetujuannya untuk bedah siasat (lihat perenggan 33).]

Notes

For cases on appeal against acquittal, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 180–213.

Cases referred to

A Dickinson v PP [1955] 1 MLJ 191, HC (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Ghazalee bin Kassim & Ors v PP [2009] 4 CLJ 737, FC (refd)
Hari Bahadur Ghale v PP [2011] 5 MLJ 785, CA (refd)
Lye Boon Hong & Anor v Ishihara Sangyo Kaiun Goshi Kaisha [1932] 1 MLJ 175 (refd)
Mohd Haniff bin Mohd Sharif v PP [2011] 5 MLJ 85, CA (refd)
PP v Chan Kim Choi [1989] 1 MLJ 404, HC (refd)
PP v Chin Chan Leong & Anor [2009] 8 MLJ 231, HC (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)
PP v Mahathir Mohamad [2013] 1 MLJ 50, CA (refd)
PP v Mansor bin Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)
PP v Sundaravelu [1967] 1 MLJ 79 (refd)
R v Donaldson & Ors (1976) 64 Cr App 59 (refd)
R v Penman (1985) 82 Cr App R 44, CA (refd)
R v Smith (1915) 31 TLR 617 (refd)
R v Storey and Anwar (1968) 52 Cr App R 334, CA (refd)
Ratten v Reginam [1971] 3 All ER 801, PC (refd)
Subramaniam v PP [1956] 1 WLR 965, PC (refd)
Veerasingam v PP [1958] 1 MLJ 76, CA (refd)
Yan Wing Lee v PP [1993] MLJU 99; [1994] 2 CLJ 453, HC (distd)
Yusri bin Pialmi v PP [2011] 4 MLJ 533, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 50(2), 51, 53, 53(2), 58, 86
Criminal Procedure Code ss 112, 113, 307, 307(6), 310, 396
Evidence Act 1950 ss 32, 60(1)(b), 114(g)
Immigration Act 1959/63
Penal Code s 300(a), (b)
Rules of the Federal Court 1995 r 95(2)

Karpal Singh (Zaleha Al-Hayat and T Sandha Kumari with him) (Karpal Singh & Co) for the appellant.
Ahmad bin Bache (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Jeffrey Tan FCJ (delivering judgment of the court):

[1] At the close of the prosecution case, the trial court acquitted the respondent ('the accused'), a medical doctor, of the following charge of murder of his estranged wife:

> Bahawa kamu pada 22hb Oktober 2007 jam di antara 7.00 pagi hingga 8.10 minit pagi, bertempat di No 27, Jalan 2/3, Bandar Country Homes, Rawang, di dalam Daerah Gombak di Negeri Selangor Darul Ehsan, telah melakukan kesalahan membunuh iaitu menyebabkan kematian Shento Kaur a/p Jaswant Singh (k/p No 610530-01-5532) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] Against acquittal, the prosecution appealed to the Court of Appeal but was unsuccessful. Hence, this is the prosecution's final appeal to reverse the order of acquittal at the close of the prosecution case.

[3] In short, the prosecution contended that the accused strangled or smothered the deceased to death at 27, Jalan 2/3, Bandar Country Homes, Rawang, where she lived separate and apart from the accused, since 2004.

[4] The prosecution case was entirely built on circumstantial evidence. In broad terms, the findings of fact of the trial court were that 'the cause of death ... remains unprove[d]', that none of the 21 prosecution witnesses 'testified ... that it was the accused and no one else who was the perpetrator of the crime or that it was the accused who caused the death of the deceased', that 'there was insufficient circumstantial evidence to connect the accused to the offence of murder', and that only one of the ingredients of the alleged offence, namely death of the deceased, had been proved. In coming to those findings, the trial court held that the prosecution had not called two material witnesses, namely the driver ('Khairuddin') and the maid ('Dariah', who was the mother of Khairuddin) of the accused, to exclude the possibility of their involvement in the death of the deceased, and that without their testimony there was a material gap in the prosecution case. Essentially, for those reasons, the trial court held that the prosecution had not made out a prima facie case against the accused.

[5] The prosecution had attempted to adduce the s 112 statement of Khairuddin to make up for want of his oral testimony, but the trial court held that the prosecution had not fulfilled the conditions of s 32 of the Evidence Act 1950 for admission of the same. According to the trial court, there was 'no diligent search and reasonable exertion' to procure those two material witnesses, and it was not shown that they 'could not be found or that their attendance could not be procured without delay and expense'. The adverse inference under s 114(g) of the Evidence Act 1950 was invoked against the prosecution for its failure to procure the attendance of those two material

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witnesses. The trial court also faulted the prosecution for not having applied to admit the s 112 statement under s 396 of the Criminal Procedure Code.

[6] On appeal to the Court of Appeal, both the rejection of the s 112 statement in evidence and the invocation of the adverse inference against the prosecution were taken up in argument by the prosecution (see p 9 of the judgment of the Court of Appeal) without objection, apparently, by the defence. But all argument on the wrongful rejection of the s 112 statement and the wrongful invocation of the adverse inference against the prosecution were not addressed by the Court of Appeal. Rather, it was the identity of the perpetrator that had captured the attention of the Court of Appeal. The Court of Appeal held that the circumstantial evidence was insufficient for an 'inference that it was the accused who killed the deceased' by the act of 'smothering or placing pressure on the neck of the deceased by a broad or soft ligature' (see pp 11–12 of the judgment of the Court of Appeal), and that the effect of the individual strands of the circumstantial evidence only amounted to the following:

> The respondent not grieving at the loss of his wife and his non-involvement in the funeral arrangements can be explained by reason of his marriage being an unhappy one resulting in both of them living apart. Prior acts of abuse as well as having an extra marital relationship are insufficient in themselves to prove a motive to kill. Likewise moving things out of the matrimonial home as, notwithstanding the estranged relationship, the respondent as husband, had rights to the things in the house.

[7] We should lay out the circumstantial evidence before we pass judgment on it. But before we get to that, we need to correct the ruling of the trial court that the voice message heard by SP3 (Dr Paranjit Kaur a/p Narajan Singh) at about 9.15pm on 21 October 2007 from her telephone was not admissible in evidence. SP3 testified (a) that there was a missed call to her from the deceased and that for the next two hours she tried but failed to reach the deceased by telephone, (b) that there was a voice message for her, and from that voice message she heard the deceased saying to another person that 'she has broken her arm and she wants to make a police report' (see 42 of the AR). At that juncture, learned defence counsel objected 'to (that) line of questioning' and submitted that it would be hearsay if the object were to establish the truth of the statements contained in the voice message. Learned DPP pointedly informed the trial court that the object was not to establish the truth. The trial court allowed the prosecution 'to continue (with) the line of questioning (for) the moment'. But the next day, when trial resumed, learned defence counsel submitted that it was incumbent upon the prosecution to show the relevancy of the voice message, even if the object were not to establish the truth, and that the statements in the voice message were only overheard by and not made to SP3. The trial court ruled that the voice message was not admissible on the ground

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that 'no statement made to the witness but only overheard by her' (see 47 of the AR).

[8] But with respect, we could support the ruling that the voice message was not admissible for reason that it was overheard and not made to SP3. An oral statement is a fact which could be heard, to be proved by the direct evidence of a witness who says he heard it (s 60(1)(b) of the Evidence Act 1950). The voice message was a fact which could be heard, and it was the direct evidence of SP3 who said she heard it. The voice message might have been overheard. Still it remained that it was heard by SP3 'When a witness speaks to a telephone conversation heard by him, over the telephone, it is admissible' (*Sarkar Law of Evidence* (16th Ed), Vol 1 at p 1169). In *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at p 969, it was held by the Privy Council per Lord Wilberforce that 'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made'. 'The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', ie as establishing some fact narrated by the words' (*Ratten v Reginam* [1971] 3 All ER 801). In the instant case, the prosecution had it put on record that the evidence of the voice message was not relied on testimonially to establish the facts narrated by the words. The object was to prove the fact of the voice message. Evidence of the fact of the voice message should not have been rejected.

[9] Learned DPP contended that the s 112 statement of the driver should also not have been rejected. Learned defence counsel countered that the rejection of the s 112 statement was not in the grounds of appeal before us. In fact, the rejection of the s 112 statement was also not in the grounds of appeal before the Court of Appeal. Nevertheless, the rejection of the s 112 statement was canvassed at the Court of Appeal, without objection by the defence. But no such quarter was given before us. It was submitted by learned counsel for the accused that as rejection of the s 112 statement by the trial court was not a ground of appeal it could not be taken up in argument by the prosecution. Up to a point, we could agree with learned counsel for the accused.

[10] By reason of s 86 of the Courts of Judicature Act 1964 which provides that 'Save as in this Act provided, in the exercise of its appellate jurisdiction, the Federal Court shall have the same jurisdiction, may exercise the same powers

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and may make any order as are had and may be exercised or made by the Court of Appeal or by the High Court', the appellate jurisdiction of the Federal Court is also governed, mutadis mutandis, by ss 53 and 58 of the Courts of Judicature Act 1964 ('the CJA'). Section 53(2) of the CJA provides that 'Every petition of appeal shall be signed by the appellant or his advocate and shall contain particulars of the matters of law or of fact in regard to which the High Court is alleged to have erred, and, except by leave of the Court of Appeal, the appellant shall not be permitted on the hearing of the appeal to rely on any ground of appeal other than those set forth in the petition'. And s 58 of the CJA provides that 'The Court of Appeal may in its discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of this Act, permit an appeal upon such terms and with such directions as it may consider desirable in order that substantial justice may be done in the matter, and may, for the purpose, enlarge any period of time prescribed by section 51 or 53'. That requirement to state the grounds of appeal is also reflected in r 95(2) of the Rules of the Federal Court 1995, which provides that 'A Petition of Appeal shall be substantially in Form 10 in the First Schedule to these Rules'.

[11] Appeals from lower courts to the High Court are governed by s 307(6) of the Criminal Procedure Code ('the CPC') which provides that 'Every petition of appeal shall state shortly the substance of the judgment appealed against and shall contain definite particulars of the points of law or of fact in regard to which the Court appealed from is alleged to have erred'. However, in view of s 50(2) of the CJA, a petition of appeal against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction must necessarily be confined to points of law (see *Public Prosecutor v Mahathir Mohamad* [2013] 1 MLJ 50 per Hishamuddin Mohd Yunus JCA delivering the judgment of the court). On application, the High Court is similarly reposed with powers to enlarge the grounds of appeal (see s 310 of the CPC which provides that 'A judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the magistrate and to the parties as the judge shall consider desirable, in order that substantial justice may be done in the matter').

[12] All petitions of appeal must particularise the points of law or of fact which the court appealed from is alleged to have erred. But that is not to say that the court is therefore powerless to permit a point of law or of fact, which is not in the petition of appeal, to be raised.

[13] In *Lye Boon Hong & Anor v Ishihara Sangyo Kaiun Goshi Kaisha* [1932] 1 MLJ 175, Sir William Murison CJ said:

> We desire to say that the practice prevailing in Singapore as to the contents of

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A memorandum of appeal in civil and criminal cases will in future be enforced in Johore.

It is as follows: Where the appellant is represented by counsel, the memorandum must contain definite particulars of the points of law or fact in regard to which the trial judge is alleged to have erred.

B

If these requirements are not complied with the appeal may be rejected or adjourned till the next sitting and the appellant will be ordered to pay the costs of the appeal or the costs of the day as the case may be.

Where the appellant is not represented by counsel the formal allegation that the trial
C *judge has erred in law and fact or either will be accepted, without the particulars abovementioned.* (Emphasis added.)

[14] Where the appellant is unrepresented by counsel, the formal allegation that the trial judge has erred in law and fact or either will be accepted, without
D the particulars. Lately, in *Mohd Haniff bin Mohd Sharif v Public Prosecutor* [2011] 5 MLJ 85, which was an appeal against conviction for a capital offence, the Court of Appeal (Suriyadi, Hasan Lah and Ahmad Maarop JJCA, as they then were) proceeded to hear and deliberate on the issues canvassed by the accused, even in the absence of a petition of appeal and even though the
E accused was represented by counsel. In *Public Prosecutor v Chin Chan Leong & Anor* [2009] 8 MLJ 231, where the detailed points of law or facts were absent and as such the petition of appeal did not comply with s 307(6) of the CPC, Lim Yee Lan J, as she then was, held that there was no prejudice to the accused or miscarriage of justice as an application for amendment of the grounds, if
F made, would have been allowed. And in *Hari Bahadur Ghale v Public Prosecutor* [2011] 5 MLJ 785, where the petition of appeal raised no issue on the identity of SP4, the Court of Appeal per Abdul Malik Ishak JCA held that the court could be 'magnanimous' to consider that issue, which in the event was considered.

G

[15] Such indulgence was not without the support of high authority. In *Veerasingam v Public Prosecutor* [1958] 1 MLJ 76, the facts were as follows. On 5 October 1956, the appellant was convicted in the Sessions Court at Kuala Selangor of two offences in contravention of s 3(c) of the Prevention of
H Corruption Ordinance 1950. On the same day he gave notice of appeal against these convictions and sentences. On 3 November 1956, he filed a petition of appeal which set out a number of grounds of appeal. On 12 March 1957, a document was filed which was entitled 'Further Grounds of Appeal' and which set out a great number of grounds of appeal not contained in the original
I petition. Counsel for the public prosecutor took up the point of delay in the filing of the further grounds of appeal. On 1 April 1957, Smith J delivered a considered judgment to the effect that he felt himself compelled by the judgment of Bellamy J, in the case of *A Dickinson v Public Prosecutor* [1955] 1 MLJ 191 to rule that the new grounds of appeal should not be argued. Counsel

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for the appellant then said that if he was precluded from arguing the new grounds of appeal he had nothing to say in support of the appeal and it was accordingly dismissed. Thereafter, the learned judge gave a certificate under s 34(I) of the Courts Ordinance to enable the matter to be taken further. The certificate stated the following points of law which came before Thomson CJ, Whyatt CJ (S) and Buhagiar J:

> In a criminal appeal to the High Court from the judgment, sentence or order of a Subordinate Court what are the powers, principles and procedure that govern:
>
> (1) the grant of an extension of time to lodge a Petition of Appeal, and
>
> (2) the permitting of amendments to a Petition of Appeal by the addition of Further Grounds of Appeal or otherwise.

[16] Thomson CJ pronounced that the rigours of s 307 had been mitigated by s 310:

> ... It is just as imperative that a rightful conviction should be successfully defended as it is that a wrongful one should be successfully attacked. And this result would be imperiled if it was possible for the prosecution to come to the trial of a criminal appeal in the dark as to the grounds on which the conviction was going to be attacked.
>
> The matter, however, does not rest there for the rigours of the provisions which have been quoted are mitigated by the provisions of s 310 which reads as follows:
>
> > A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as such Judge shall consider desirable, in order that substantial justice may be done in the matter.
>
> That section clearly enables indulgence to be shown to an appellant who has not given notice of appeal within the prescribed time or who having failed to file his petition of appeal within the prescribed time has accordingly been treated as if his appeal had been abandoned. On the construction, however, which has been placed by s 307 it goes a little further. On that construction a party who has not specified a particular error of law or of fact in respect of which the court a quo is said to have erred is debarred from relying on that particular error at the hearing of the appeal and pro tanto he is debarred from appealing. In such a case it seems clear that the section empowers a judge to grant him indulgence on such terms as he may consider desirable 'in order that substantial justice may be done in the matter'.
>
> Excessive didacticism is a judicial sin which may easily give rise to a great deal of unnecessary litigation. In the present proceedings it is not for us to lay down any rule as to how the powers of the court under s 310 are to be invoked. The ordinary way of doing so is clearly by notice on motion though that would always be subject to such directions as the judge might give in terms of the section. *Nor would we attempt any definition of what is substantial justice beyond suggesting in this connection*

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that substantial justice is done when a rightful conviction is upheld and a wrongful one is quashed. (Emphasis added.)

[17] Turning to *A Dickinson v Public Prosecutor*, Thomson CJ pronounced that it was an error to attempt to lay down any principles whatsoever, other than those found in the relevant statute, to govern the exercise of discretion:

> It will be noted that the learned judge lays it down that an appellant who wishes to amend his petition of appeal out of time must satisfy each of two conditions, firstly, that circumstances exist which justify an extension of time and secondly that he has a reasonable prospect of success on the appeal on the new matters which he is desirous of raising. Had these conditions been stated in the alternative, and not cumulatively, we might have been prepared to accept the passage quoted as a tolerably accurate piece of inductive reasoning based upon a number of cases in which the English Court of Criminal Appeal has granted or refused similar indulgence to the appellants. Where, however, we think the learned judge was in error was in attempting to lay down any principles whatever, other than those found in the relevant statute, to govern the exercise of a judicial discretion reposed in him. As was said by Bowen LJ, in the case of *Jones v Curling* 13 QBD 262 at p 271:
>
> > I have always entertained the strongest opinion that the Court would be acting ultra vires if it were to lay down a hard and fast line upon which discretion should be exercised when the Act of Parliament or Judicature rule which creates the discretion gives it in ample and unqualified terms.
>
> In laying down any such general rule as was pointed out by Brett MR, in the case of *The Friedeberg* 10 P 112 113, a judge is trying to fetter his own discretion and that of his successors which he has no legal power to do.
>
> The only fetter which s 310 places upon the exercise of the discretion which it gives to the judge is that it shall be exercised 'in order that substantial justice may be done'. Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original petition of appeal. *And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original petition of appeal.* He must consider his own powers as to such matters as the granting of adjournment and the requiring of notice to be given. *And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other judge but if he does he must be careful to look at what that other judge has done merely as an illustration and not as laying down any judicial precedent* (see the observations of Bowen LJ in *Jones v Curling* 13 QBD 262). (Emphasis added.)

[18] Substantial justice be done was also emphasised in *Public Prosecutor v Sundaravelu* [1967] 1 MLJ 79, when Raja Azlan Shah J as HRH then was, said:

> This application brings into review the provisions of s 310 of the Criminal

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Procedure Code (Cap 6). It is clear from the provisions of that section that this court has a discretion whether or not to allow the application, but to my mind emphasis is laid on the phrase 'in order that substantial justice may be done in the matter'. I think the provisions of this section have been well gone into by the Court of Appeal in *Veerasingam*'s case [1958] MLJ 76.

[19] Emphasis is laid on substantial justice. But substantial justice would never be done, if errors of the courts below could not be put right. We therefore expressly overrule *Yan Wing Lee v Public Prosecutor* [1993] MLJU 99; [1994] 2 CLJ 453 and the cases that followed it, which purported to lay down an inflexible rule that it is mandatory that grounds not itemised in the petition of appeal must be disregarded without any discretion to admit it.

[20] In our opinion, the s 112 statement was wrongly rejected by the trial court on the stated reason. The invocation of the adverse inference was not warranted, for there was a comprehensive account of the efforts taken by the prosecution to secure the attendance of Khairuddin, who with Dariah had been deported to their country of origin in 2008, after they had served their term of imprisonment for an offence under the Immigration Act 1959/63 (see 188 of the AR and exh P59). They could not be traced thereafter by the Indonesian police (see testimony of the investigation officer ('SP17') at 184 of the AR), from whom SP17 had sought assistance in 2010. The unchallenged evidence was that Khairuddin and Dariah had not since re-entered Malaysia (see 194 of the AR). Khairuddin and or Dariah were evidently beyond our shores and the reach of the prosecution. The prosecution could not do more than enlist the assistance of the Indonesian police to secure Khairuddin and or Dariah. The prosecution had done all that were doable to secure the attendance of Khairuddin, whose failure to testify could not therefore be put down to any fault or failing on the part of the prosecution. There was no withholding or suppression of material evidence for the invocation of s 114(g) of the Evidence Act (see *Yusri bin Pialmi v Public Prosecutor* [2011] 4 MLJ 533 and *Ghazalee bin Kassim & Ors v Public Prosecutor* [2009] 4 CLJ 737). Unfortunately, that was not corrected by the Court of Appeal. We ask, would substantial justice be done, if we were to deny what should be in evidence in the first place? The rejection of the s 112 statement was taken up and argued in the Court of Appeal. Before us, the prosecution had not raised a new issue. Had there been a formal application to enlarge the grounds of appeal, we would have granted it. Thus, we are not disposed to accept that want of a formal application could inhibit our consideration of the s 112 statement which, as said, was wrongly rejected on the stated reason.

[21] There was one other crucial finding with which we could not agree with the trial court who held that the cause of death was not established.

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[22] From his external examination, the pathologist ('SP5' — Shahidan bin Md Noor) found that the face of the deceased was 'congested — merah penuh dengan darah' with spots of 'petechiae' (the bursting of blood vessels close to the skin) and the presence of conjunctival haemorrhage (see 60 of the AR), which symptoms were consistent with asphyxiation as the cause of death. That the fingers of the deceased were bluish in colour was also consistent with asphyxiation. That both nostrils of the deceased were oozing fluid mixed with blood was also consistent with asphyxiation. Apart from those symptoms, the pathologist also found (a) 'terdapat perdarahan di bahagian pada atas dada, belakang atas, di bahagian bahu dan belakang lengan atas' (see 61 of the AR), (b) 'kawasan lebam yang kurang jelas pada bahagian belakang dalam tangan kanan', (c) haemorrhage in the right knee, (d) an internal haemorrhage in the left elbow, (e) 'tangan kiri cacat kerana ... tulang ulna terkeluar', (f) 'calar 1.1cm pada tengah belakang tangan kiri', (g) 'udara dalam tisu pada bahagian dada atas dan terdapat juga kawasan di leher di mana kulit telah terkelupas', and (h) 'hypostasis (darah yang terkumpul darah tidak bergerak masih ada dalam tisu)'. From his internal examination, the pathologist found (i) the scalp was swollen at several places, (j) haemorrhage in the muscles in both temporalis (k) haemorrhage in the right parietal of the skull, measuring 8 x 5cm, (l) serious congestion in the mouth and neck region, (m) the presence of petechiae in larynx, tongue and epiglottis (the membrane attached to the entrance of the larynx), and (n) froth in the respiratory tract. Those were facts observed by the pathologist. And on the basis of the facts observed by him, the pathologist opined that it was 'asphyxia iaitu kekurangan oksigen masuk ke dalam tubuh tapi saya tidak pasti apakah yang menyebabkan boleh berlaku benda ini. Oleh itu saya telah berikan sebab untuk permit untuk mengubur sebagai pending further investigations'. The pathologist concluded:

> Kerana ciri-ciri asphyxia yang jelas seperti congestion, petechiae dan cyanosis (the appearance of a blue or purple colouration of the skin or mucous membranes due to the tissues near the skin surface being low on oxygen) ia telah menimbulkan syak yang kematian ini bukanlah kematian biasa dan setelah mengambil kira semua fakta termasuk latar belakang si mati saya telah memberikan sebab yang mungkin menyebabkan asphyxia tersebut disebabkan oleh smothering iaitu tutup lubang hidung tersebut dan mulut supaya seseorang itu sukar bernafas atau penekanan pada bahagian leher dengan sesuatu yang lembut yang menyukarkan pernafasan (see 63 of the AR).

[23] The pathologist also opined that the symptoms of asphyxia, namely congestion, petechiae and cyanosis, were inconsistent with drugs as the cause of death (see 64 of the AR), that the injuries were not more than three days old, and that the time of death was between 24 and 36 hours before the deceased was brought to hospital for the post mortem (see 71 of the AR). Under cross-examination, the pathologist clarified that it was his conclusive finding that the cause of death was 'most likely ... smothering pressure of the neck due to broad soft ligature' (see 77 of the AR). The pathologist explained that his

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finding was in those terms because he did not have the background facts (see 78 of the AR). 'Dari pengalaman saya sendiri kes-kes yang melibatkan mati disebabkan oleh asphyxia bila mana leher ditekan samada dicekik dengan tangan atau tali atau dismother tanda-tanda asphyxia itu ada tapi background itu tidak ada tidak berani kita hendak bagi'. 'Tetapi kalau background tidak ada saya tidak berani untuk beri sebab kematian oleh sebab asphyxia jadi kalau ada tanda-tanda asphyxia kalau tidak ada latar belakang tak berani nak buat keputusan asphyxia sebab tanda-tanda asphyxia ini transient dan tanda-tanda ini akan hilang. Jadi tidak berani hendak beri sebab kematian' (see 79 of the AR). 'Berdasarkan pengalaman saya yang sedikit tentang asphyxia sebab kematian yang disebabkan oleh asphyxia ini saya perlu beri berhati-hati. Sebab itulah dalam conclusion saya, saya menyatakan kemungkinan besar dia mungkin ditekup hidung dia atau bahagian leher dengan sesuatu yang lembut' (see 80 of the AR).

[24] The evidence of the pathologist was very clear. The deceased had multiple injuries, and had died from asphyxia. The deceased had not died from natural causes. Those observations of a witness of fact were not challenged. And there was also no suggestion that the injuries were self inflicted. As for the cause of the asphyxia, the ultimate conclusion of the pathologist was 'kemungkinan besar dia mungkin ditekup hidung dia atau bahagian leher dengan sesuatu yang lembut'. On the cause of death, the pathologist was absolutely categorical. It was asphyxia. As for what caused the asphyxia, the pathologist was not an eyewitness. For that reason, the pathologist could only deduce 'kemungkinan besar dia mungkin ditekup hidung dia atau bahagian leher dengan sesuatu yang lembut'. The effect of that testimony of the pathologist was that the deceased was forcibly asphyxiated. '… the precise mode of killing was not material' (*R v Smith* (1915) 31 TLR 617, at p 618 per Lord Reading LCJ). In *R v Penman* (1985) 82 Cr App R 44(CA), 'an expert witness gave evidence that he was of the opinion that the glass found on the accused's shoes came from the premises which the accused was alleged to have burgled. The fact that the expert witness said that he could not be sure that his conclusion was correct did not mean that the jury could not be satisfied so that they were correct' (see *Phipson on Evidence* (17th Ed), at paras 33–68). On the cause of death, the pathologist had deposed as an expert (see *Rao & Rao, Expert Evidence* (4th Ed), at p 17). Without the evidence to contradict it, the trial court should have accepted the conclusion of the pathologist and not rejected it (see *Expert Evidence, Law & Practice* by Tristram Hodgkinson at p 237). And on the facts as related by the pathologist, we are satisfied beyond all reasonable doubt that the cause of death was not accidental, not suicidal but homicidal. We could not therefore agree that there was no conclusive finding by the pathologist on the cause of death.

[25] Together, the multiple injuries and the symptoms of asphyxia in

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particular could only produce the one and only logical deduction. The death of the deceased was a homicide with the requisite intent to kill within the meaning of s 300(a) or (b) of the Penal Code. Given the multiple injuries and the symptoms of asphyxia in particular, it should have been evident to the accused who was a medical doctor no less that the deceased could not have died from natural causes. Yet when asked for the reason for the death of the deceased, the accused responded as if the deceased had died from some innocent cause. The reaction of the accused was that the cause of death of the deceased was anything but homicidal. Was there reason for the accused to act as if the death of the deceased was not a homicide? Was it because the accused acted so to conceal homicide? If so, then what would have been the reason of the accused? Those questions arose from the circumstantial evidence which we have summarised, in the approximate order in which it ensued, as follows:

(a) the testimony of SP14 (Police Sergeant Rajan a/l Nadasar) that on 15 October 2007, the deceased came to the Genting Highland Police Station and complained that the accused physically assaulted her when she enquired from him about an SMS message he had received from his paramour (134 of the AR);

(b) the unchallenged testimony of SP3 (Dr Paranjit Kaur a/p Narajan Singh, who was the sister in law of the deceased) that on 21 October 2007 at 9.15pm, she noticed there was a missed call for her from the deceased, that from her voice mail she heard a telephone conversation between the deceased and another person, wherein which conversation the deceased related that her hand was broken and she wanted to lodge a police report (see 41–42 of the AR);

(c) the unchallenged testimony of SP7 (Jagdish Kaur a/p Ojagar Singh, the sister of the accused) that she arrived at the deceased's house at about 8.15am or 8.30am on 22 October 2007 (see 86 of the AR), that the accused, clad with a towel around him, was sitting on the stairs and holding the deceased who was dressed in a t-shirt and shorts and who was also on the stairs, while the driver was standing behind them (see 87–89 of the AR), that the accused was crying and saying some words" 'I remember the word bronchitis' (see 87 of the AR), and that the accused and driver carried and then laid the deceased on the bed (see 89 of the AR);

(d) the unchallenged testimony of SP2 (Kurdip Singh a/l Ojagar Singh, the brother of the accused) that in the morning of 22 October 2007 Daljit Kaur informed him of the death of the deceased, that he reached the house of the deceased at 9am (see 29 of the AR), that the accused, clad in a towel, was crying (see 30 of the AR), that the body of the deceased was lying nearby, on a bed, that Dr Gurmit Singh told him that the deceased was an asthmatic patient and had probably died from difficulty in breathing (SP2 was only cross-examined on the burial certificate);

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(e) the unchallenged testimony of SP3 that due to matrimonial differences, the accused and deceased were living separate and apart (see 43 of the AR);

(f) the unchallenged testimony of SP3 that on 22 October 2007 at 9.45am she was informed by her sister in law, one Savinder Kaur, that the deceased had died, and that she immediately telephoned the accused who informed her (i) that the deceased had died from an overdose of sleeping pills, (ii) that he (the accused) found the deceased all dressed up, 'in that state', in the master bedroom, (iii) that the deceased was alone when he (the accused) was there, and (iv) that he (the accused) had sent the driver out to buy breakfast (see 48 of the AR);

(g) the unchallenged testimony of SP3 that in the same telephone conversation she told the accused 'to verify the cause of death by a post mortem because she died at a young age of 46' (see 45 of the AR) and also because the deceased had no history of chronic illnesses such as diabetes, hypertension or asthma (see 48–49 of the AR);

(h) the unchallenged testimony of SP4 (Dr Gurdial Singh a/l S Jaswant Singh, the husband of SP3 and the elder brother of the deceased) that on 22 October 2007 at about well before 5–6pm, the accused informed him that the deceased had died from an overdose (see 52 of the AR), that he asked 'overdose of what' and the accused replied 'never mind we can do a gastric lavage' (see 52 of the AR), that he and accused agreed, after some discussion, to a post mortem, and that the accused did not attend the funeral of the deceased (see 52 of the AR) (SP4 was only cross-examined on the giving of consent by the accused for the post mortem; and

(i) the testimony of SP10 (Jasminder Kaur a/p Naranjan Singh, sister of the deceased) that the accused was not making preparations for the funeral but was carrying things out of the house, that the accused was out of the house for some time, that SP4 spoke to the accused about the necessity of a post mortem (see 108 of the AR).

[26] Since there was no statutory pre-condition to be first fulfilled for its admission (for example, as in the case of s 113 of the Criminal Procedure Code), the aforesaid statements of the accused were admissible in evidence, not so much as to the truth of the facts asserted in those statements, but of the fact that those statements were made by the accused to SP7, SP3, and SP4. The law for its admission is clear. 'Where the truth of what A told B is in issue, what B says A told him is hearsay and inadmissible in the absence of the evidence of A. The outlook would, however, be otherwise where the object of such evidence is not to establish the truth of A's statements but only the fact that A did make a statement' (*The Indian Evidence Act* by Jaswant Singh, Depak Arora and RS Dogra, (1999 Ed), at p 758). The statements of the accused were evidence of what he said (see *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors*

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A [1977] 1 MLJ 180 at p 193) and not of the truth of the contents (see *Public Prosecutor v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 at p 577, where Chong Siew Fai CJ (Sabah & Sarawak) held as correct the ruling in *Public Prosecutor v Chan Kim Choi* [1989] 1 MLJ 404 and in *R v Storey and Anwar* (1968) 52 Cr App R 334 (CA) that an exculpatory statement is not
B evidence of the truth but is evidence of the reaction of an accused which forms part of the general picture to be considered). 'When the Crown adduces evidence in the form of a statement by the defendant which is not relied on as an admission of the offence charged such a statement is evidence in the trial in that it is evidence that the defendant made the statement and of his reaction
C which is part of the general picture which the jury have to consider but it is not evidence of the facts stated' (*R v Donaldson & Ors* (1976) 64 Cr App 59 at p 65 per James LJ).

D **[27]** It was in evidence that the marriage between the deceased and the accused was 'a bad marriage' plagued by constant quarrels and fights (see 51 of the AR). Since 2004, the deceased and the accused had lived separate and apart. But even whilst apart, the accused displayed malevolent intent towards the deceased. A week before her death, the deceased related that the accused had
E physically assaulted her. On the night before her death, the deceased related that her hand was broken and she wanted to lodge a police report. The post mortem revealed that the deceased had a broken elbow, which substantiated the truth of the facts asserted in the telephone conversation heard by SP3 on 21 October 2007.

F

[28] That was the state of the marriage before the death of the deceased. As for the happenings as witnessed on that fateful day, the first witness at the scene was SP7 who reached the house at 8.45am and found the accused on the staircase, holding the deceased, crying and saying 'bronchitis', with
G Khairuddin standing behind the deceased and the accused. Thereafter, the accused and Khairuddin carried and then laid the deceased on a bed.

[29] The next witness at the scene was SP2 who reached the house at 9am and who likewise found the accused crying. Meantime, at about 9.45am, via
H the telephone, SP3 was informed by the accused that the deceased had died from an overdose of sleeping pills. In the same telephone conversation, SP3 impressed upon the accused on the necessity to conduct a post mortem to verify the cause of death as the deceased had no history of chronic illnesses such as diabetes, hypertension or asthma.

I

[30] The next witness to arrive at the house was SP10, who found the deceased dead and the accused not making preparations for a funeral. SP10 noticed that Khairuddin and Dariah were moving things out of the house, and that the accused was away from the house for extended periods.

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[31] The last family member who was at the house and who also testified was SP4, who must have reached the house at sometime before 5–6pm (see 52 of the AR). SP4 was informed by the accused that the deceased had died from an overdose. SP4 asked 'overdose of what' and the accused answered 'never mind we can do a gastric lavage' (see 52 of the AR). The accused could not relate 'overdose of what'. SP4 and the accused then had a discussion on a post mortem. Thereafter, the accused agreed to a post mortem.

[32] After the post mortem, the deceased was cremated. But the accused was not present at the funeral.

[33] One other unchallenged fact was that the government chemist (SP8 — Dr Mohd Sukri bin Hassan) found no traces of common drugs or pesticides in the kidney specimen of the deceased, and no traces of alcohol or diazepam (a tranquilliser) in the blood specimen of the deceased. Given those scientific findings, it could be safely concluded that the deceased could not have died from an overdose of drugs. Further, the deceased could not have died from bronchitis, as the cause of death was homicidal. But yet the accused said that the deceased had died from bronchitis, from sleeping pills, and from an overdose of a drug he could not specify. The accused proffered three different non-homicidal causes for the death of the deceased. Now for the sake of argument, let it be assumed that the accused was unaware that it was a homicide, albeit the signs and symptoms of trauma that then would have been fresh and therefore much more visible than when the pathologist conducted the post mortem a day later. But if the accused were unaware that it was a homicide, then the accused must surely have realised that he could never ever be implicated in the death of the deceased, despite the history of their 'bad marriage'. If the accused were unaware that it was a homicide, then the accused should not fear the truth. It should not and would not have mattered to the accused if the truth be out. But if there were so, then what was the reason for the accused to have proffered three untrue non-homicidal reasons for the death of the deceased? When SP7 was in the house at 8.45am, the accused muttered bronchitis. When SP3 spoke to him on the telephone at 9.45am, the accused said that the deceased had died from an overdose of sleeping pills. And at about 5pm, the accused said to SP4 that the deceased had died from an overdose of a drug that he could not specify. Had the accused proffered just one reason for the death of the deceased, it could be perhaps be rationalised that it could have been mere guesswork on his part. But as the accused had given three different and untrue reasons to three different witnesses, changing the reason as the day progressed, it could not then be simply dismissed as mere innocent guesswork on his part. If the accused were unaware that it was a homicide, then there could not be reason for him to give three untrue reasons to three different witnesses for the death of the deceased. In any case, why should the accused speculate on the cause of death? At 9.45am, SP3 had already impressed upon

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him on the need to conduct a post mortem, which post mortem would settle the cause of death and thus put all 'guesswork' on the cause of death to rest. But yet consent for a post mortem was not given until late in the afternoon and only after SP4 had discussed with him on the conduct of a post mortem. If the accused were unaware that it was a homicide, then it should follow that he would not have delayed the giving of his consent for a post mortem. Indeed, given the history of the bad marriage, it should have dawned upon the accused, that is, if he had nothing to do with the death of the deceased, that the conduct of a post mortem, the earlier the better, would only serve his interests, to clear him of whatever suspicion of any foul play. But wholly inconsistent with innocence, the accused gave false reasons to account for the death of the deceased and delayed the giving of his consent for a post mortem.

[34] Other conduct of the accused on that day was also at odds with innocence. According to SP7 and SP2, when they found the accused at 8.45am and at 9am of 22 October 2007, he was holding the deceased on the stairs and crying. Since the accused was crying from 8.45–9am, it would appear that notwithstanding the bad marriage, the accused was yet gravely moved and distraught over the death and loss of his estranged wife. In the morning of 22 October 2007, it would appear that the accused was a husband in profound grief. But soon thereafter, the accused was not the same person. He was away from the house for extended periods. He made no preparations for the funeral. Meantime, his driver and maid were moving things out of the house, as if that were the more important task at hand. And the accused did not attend the funeral of one he had grieved over so profusely the day before.

[35] The Court of Appeal held that 'The respondent not grieving at the loss of his wife and his non-involvement in the funeral arrangements can be explained by reason of his marriage being an unhappy one resulting in both of them living apart ... Likewise moving things out of the matrimonial home as, notwithstanding the estranged relationship, the respondent as husband, had rights to the things in the house'. All except, that the unchallenged evidence was that on the very morning in question, the accused was found in profound grief, which only showed that the accused did care, which put into question the later conduct of the accused on that day and then his absence at the funeral.

[36] The conduct of the accused must be viewed as a whole. And when viewed as a whole, the total conduct of the accused was incongruous with innocence. It was also contrary to the involvement of any third party, for if it were someone else, be it an unknown person and or Khairuddin and or Dariah, who had done it, the conduct of the accused could have been consistent with the fact of homicide by someone else. If someone else had done it, there was absolutely no reason or purpose for the accused to ascribe the cause of death to non-homicidal causes. The accused was betrayed by his conduct which was

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inconsistent with the truth of the matter. On the facts, the only plausible reason for the accused to have ascribed the death to non-homicidal causes was to conceal homicide in the hope that in doing so he could perhaps escape incrimination. Indeed, if the post mortem had not been conducted, homicide would have been concealed. Already everything pointed irresistibly to the accused as the perpetrator. Already, there was a prima facie case to answer.

[37] The s 112 statement of Khairuddin, which was given on 30 October 2007, only put the evidence over the top. According to the s 112 statement of Khairuddin, the accused was the last person with the deceased when alive at about 7am on 22 October 2007. The deceased was seated on a bed, with the accused in the same room. The accused sent him out to buy breakfast. But at 7.45am the accused telephoned and summoned him to immediately return. When he reached the house at 8.10am, he found the accused crying. The accused said that the deceased had passed away. The deceased was lying on a bed in a room on the third floor. 'Saya lihat madam memakai skirt dan ada basah dan bau kencing dan busuk.' The accused instructed him to clean up the place, which he did with a mop. The accused instructed him to help carry the deceased to the lower floor. 'Kemudian datang adik perempuan tuan ... kami bertiga telah turunkan madam ke bilik tuan di tingkat 2. Tuan telah tukar baju madam ....' In his statement, Khairuddin also asserted that there was a fight between the accused and deceased at the Genting Highlands condominium on 15 October 2007.

[38] That s 112 statement of Khairuddin was untested by cross-examination. It did not have the weight of sworn testimony. Yet it was evidence. It could not be discarded. Weight must still be given to it. It turned out that the evaluation of weight was not a gordian knot. We tested the facts asserted by Khairuddin against the established facts.

[39] First, we noted that Khairuddin was a chauffeur, the likes of whom are not normally imbued with forensic knowledge. Khairuddin noticed that the clothing of the deceased was wet and reeked of urine, and that there was a foul stench. Pertinently, according to all scientific material, and we need only to cite one article — 'How to Improve Your Investigation and Prosecution of Strangulation Cases' by Gael B Strack, San Diego Assistant City Attorney and Dr George McClane, Emergency Physician — the 'objective signs noted in strangulation victims include involuntary urination and defecation'. Khairuddin asserted a fact that was consistent with forensic science, the knowledge of which would have been beyond a lay person.

[40] Khairuddin asserted that there was a fight between the accused and deceased at the Genting Highlands condominium on 15 October 2007. And matchingly, the testimony of SP14 was that the deceased came to the Genting

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Highlands Police Station and complained that the accused had physically assaulted her. Khairuddin asserted that the accused sent him out to buy breakfast. And matchingly, the testimony of SP3 was that the accused said that he had sent the driver out to buy breakfast. Khairuddin asserted that the accused instructed him to help carry the deceased to the lower floor. 'Kemudian datang adik perempuan tuan ... kami bertiga telah turunkan madam ke bilik tuan di tingkat 2'. And fittingly, the testimony of SP7 was that she found the accused on the stairs holding the deceased, with Khairuddin behind them, and the testimony of SP15 (Sergeant Yahaya bin Adam) was that he found the body of the deceased on a bed in a room on 'tingkat dua' (see 141 of the AR). Khairuddin asserted that 'pergelangan tangan kiri madam patah' and the post mortem report stated that the 'left hand was deformed at its inner wrist'.

[41] It was unmistakable that the s 112 statement was replete only with truth. Nothing asserted was contradicted by the established facts. The s 112 statement stood the test of the established facts. In every material aspect, the s 112 statement was corroborated and substantiated by the established facts. There was no reason to doubt it. There was also no reason not to rely on it for proof of the fact that the accused was the last person with the deceased when alive.

[42] The act was not witnessed. But based on our aforesaid maximum evaluation, the circumstantial evidence gave rise to the one and only logical inference that it was the accused and the accused alone who caused the death of the deceased. The combined strands of evidence, when twisted together (see *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307) had made out the ingredients of the charge beyond all reasonable doubt. There was a prima facie case that would warrant conviction if the accused were to elect to remain silent. We therefore unanimously set aside the acquittal and order the accused to enter upon his defence, before the same trial court.

Appeal allowed and acquittal set aside.

Reported by Afiq Mohamad Noor